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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) FINAL ORDER
RIGHT NO. 23770-41F BY HUGHES RANCH)

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. One timely written exception was received.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the May 17, 1988 Proposal for Decision, except for the modifications specified below, and incorporates them herein by reference.

RESPONSE TO EXCEPTION

Objectors Ora Megee and James E. Robertson excepted to the Proposal for Decision specifying the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West as the diversion point for the Higbee Ditch. Their exception states, "Although there is no dispute as to where the Higbee Ditch point of diversion is physically located, the Objectors maintain that the legal description of the point of diversion shown in the Proposal for Decision (NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35) is incorrect. The point of diversion is actually located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 2 South, Range 4 West."

Review of the Water Resources Survey for Madison County and of current aerial photographs of the area in question shows that the Objectors are incorrect in locating the point of diversion in Township 2 South, Range 4 West. The diversion point clearly is located in Township 4 South, Range 2 West. However, the Objectors are correct that the legal description of the Higbee Ditch point of diversion, to be accurate, should specify the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ rather than the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35.

Therefore, Finding of Fact 4 hereby is modified to specify the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West, Madison County, Montana as the point of diversion for the Higbee Ditch. The Order in this matter also is modified to more accurately identify the location of the Higbee Ditch point of diversion.

WHEREFORE, based upon the Findings of Fact and Conclusions of Law and any modifications specified herein, and upon the record in this matter, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. 23770-41F is hereby granted to Hughes Ranch to change the diversion point for claimed Water Rights Nos. W023770-41F, W023771-41F, and W023773-41F to the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West, from the past point of diversion in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township

4 South, Range 2 West (Schoenberger Ditch, incorrectly described in the Statements of Claim as diverting at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35), Madison County, Montana. Authorization is also granted to change the means of diversion from the Schoenberger Ditch to the Higbee Ditch. Water will be carried from the Higbee Ditch to the lower Schoenberger Ditch, by means of a pipeline, for distribution to the claimed places of use. The source of water for the diversion is South Meadow Creek.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of the Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. The Appropriator shall ensure that the headgate and ditch which constitute the means of diversion are constructed and maintained in a manner adequate to carry the entire flow of water to which the Appropriator is entitled. In the event that the

flow which the Appropriator is able to obtain exceeds the capacity of the Higbee Ditch, the headgate and ditch must be modified to adequately divert and carry the maximum flow.

D. Issuance of this Change Authorization by the Department in no way grants the Appropriator any easement rights, or the right to enter upon the property of other persons or upon federal lands to exercise this Change Authorization, or to enlarge any existing easements.

E. The Appropriator must maintain a measuring device capable of accurately measuring all flows to be diverted through the Higbee Ditch. In the event that the Appropriator is able to obtain flows which cannot be handled by the present measuring device, the measuring device must be modified or replaced by a measuring device capable of accurately measuring the maximum flow. Such measuring device must be approved by the appropriate water commissioner prior to any diversion made pursuant to this Change Authorization.

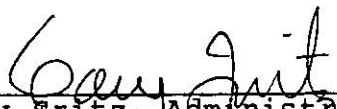
F. The change in water use granted by this authorization is subject to the authority of court appointed water commissioners to admeasure and distribute water in the source of supply.

NOTICE

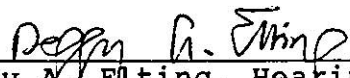
The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a

petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 23 day of June, 1988.



Gary Fritz, Administrator
Department of Natural
Resources and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6605



Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
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(406) 444 - 6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 24th day of June, 1988, as follows:

Hughes Ranch
Box 51
McAllister, MT 59740

Ora Megee
Box 131
McAllister, MT 59740

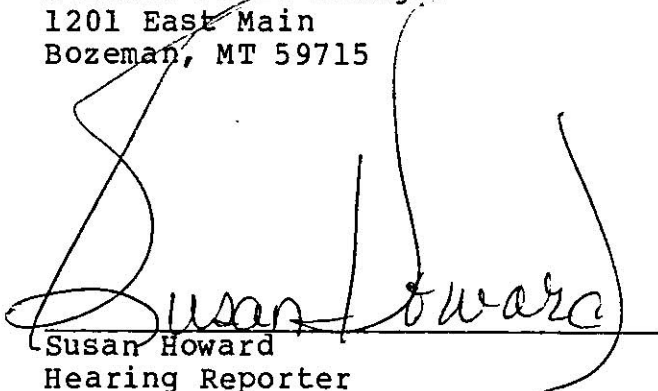
David C. Moon
P O Box 1288
Bozeman, MT 59771-1288

L. Gibbs
Box 57
McAllister, MT 59740

James H. Morrow
Morrow, Sedivy, & Bennett, P.C.
P O Box 1168
Bozeman, MT 59771-1168

James E. Robertson
421 South Black Avenue
Bozeman, MT 59715

Scott Compton
Bozeman Field Manager
1201 East Main
Bozeman, MT 59715


Susan Howard
Hearing Reporter

B.B

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR CHANGE OF APPROPRIATION WATER) PROPOSAL FOR DECISION
RIGHT NO. 23770-41F BY HUGHES RANCH)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on March 24, 1988 in Ennis, Montana.

Applicant Hughes Ranch appeared at the hearing through Lewis Hughes and Larry Hughes, and by and through counsel James H. Morrow.

Objector Ora Megee appeared at the hearing in person, and by and through counsel David Moon.

Objector James E. Robertson appeared at the hearing in person and by and through counsel David Moon.

Objector Lawrence Gibbs appeared at the hearing in person.

Scott Compton, Field Manager of the Bozeman Water Rights Bureau Field Office, appeared at the hearing as a staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

EXHIBITS

The Applicant offered three exhibits for inclusion in the record in this matter:

Applicant's Exhibit 1 is a photocopy of a Water Master's Report (Upper Missouri Division - Madison River Basin (41F), Claim No. 41F-W-023771-00, Case No. 41F-74), issued by Water Master Kathryn Lambert on June 8, 1987.

Objection was entered to Exhibit 1 on the grounds that it is irrelevant. The objection hereby is overruled on the basis that the Exhibit contains probative value on the issue of Department jurisdiction (see Preliminary Matters). Applicant's Exhibit 1 is accepted for the record.

Applicant's Exhibit 2 consists of three photocopied maps, one map hand drawn by Larry Hughes to show various diversion and distribution ditches, and two maps taken from the Water Resources Survey for Madison County.

Objection was made to Exhibit 2 based on counsel for the Applicant's verbal description of the Exhibit, but withdrawn after clarification that the source of the first map was a drawing by Larry Hughes which accurately corresponds with his knowledge of the area. Applicant's Exhibit 2 was accepted for the record.

Applicant's Exhibit 3 is a copy of an engineering report which discusses installation of a measuring device on Higbee Ditch. The exhibit was offered to show that the Applicant's measuring device is technically adequate.

Objection was made to Exhibit 3 on the basis that the report describes a Parshall flume, rather than a weir such as the Applicant installed, and discusses installation using measurements which differ from the 3-foot rectangular weir which the Applicant testified is the measuring device on the ditch. The Objection was sustained, and Exhibit 3 was not accepted for the record.

The Objectors offered three exhibits for inclusion in the record:

Objectors' Exhibit A is an ASCS aerial photograph of the area in question, with an overlay, marked with the location of various ditches, houses, and property lines. Applicant Larry Hughes drew in the proposed location of the pipeline on the overlay at the hearing (green ink).

Objection was made to Exhibit A on the basis of being irrelevant and immaterial to the issue of the proceeding. The objection was overruled, and Exhibit A was accepted for the record.

Objectors' Exhibit B consisted of four photographs of the Higbee Ditch, taken by David Moon. The photographs were offered for Scott Compton's review, during a discussion of the weir which was depicted. However, Mr. Compton stated that he had not seen the weir and would not be able to testify about it. The photographs were not accepted for the record.

Objectors' Exhibit C was a photocopy of the Application in this matter.

Objection was made to Exhibit C on the basis that it was repetitive of the original of the Application already in the file. The objection was sustained, and Exhibit C was not accepted for the record.

The Hearing Examiner informed the parties that the original of the Application, as well as the rest of the Department file in this matter, would be made part of the record unless the parties had objection to the inclusion of any of the contents. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

The Department did not offer any exhibits for inclusion in the record in this matter.

PRELIMINARY MATTERS

The Applicant moved to dismiss the objections to the Application in the present matter based on the following grounds: (1) that the objections fail to state facts sufficient to "support any claim of insufficiency of change of place of diversion", (2) that the Department does not have jurisdiction to make any findings or conclusions based on the stated objections, and (3) that the change in place of diversion was agreed to "after trial in the Montana Water Court." (Objectors' Motion to Dismiss, offered at the March 24, 1988 hearing in this matter.)

Counsel for the Objectors verbally opposed the Motion to Dismiss, arguing that the Motion was filed too late pursuant to ARM 36.12.213 and should be denied, that the objections are as complete as is possible considering that the Application and Public Notice did not provide detailed information about the project, that the Public Notice in this matter was defective, that the Department has jurisdiction to look at the proposed diversion in its entirety, and that a review of the Court minutes of the meeting which led to the Master's Report (Applicant's Exhibit 1) indicates that the Water Master's Findings are based on an agreement that the change in point of diversion would be processed by the Department. After testimony was completed, counsel for the Objectors waived their argument that the Public Notice was defective, based on information which was presented to "flesh out" the Application and Public Notice.

The Hearing Examiner took the Motion to Dismiss under advisement, informing the parties that the hearing would proceed and that the Motion would be responded to in the Proposal for Decision. The Hearing Examiner hereby responds to the Motion to Dismiss:

1. Pursuant to MCA §85-2-308, an objection is sufficient if it is filed by the date specified by the Department in the Notice of Application, and if it states the name and address of the objector and facts tending to show that "there are no unappropriated waters in the proposed source, that the proposed means of diversion are inadequate, that the property, water rights, or interests of the Objector would be adversely affected by the proposed appropriation, that the proposed use of water is not a beneficial use, or that the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved." Although some of the listed factors obviously are more pertinent to applications for new use permits than to applications for changes in existing water rights, the statute provides great latitude in the bases for objection.

The objections which were filed in the present matter are sufficient to meet the filing requirements of the statute. All of the objections were timely, they each state the name and address of the objector, and each lists facts "tending to show" one of the listed bases for objection. The objections of Megee, Robertson, and Gibbs allege that "it is impossible to irrigate claimed place of use" from the ditch which the Applicants applied for as the new point of diversion, which allegation tends to show that the proposed

means of diversion are inadequate. Therefore, the Motion to Dismiss cannot be granted based on the insufficiency of the objections filed in this matter.

2. The Department has jurisdiction to review the Application in light of the objections, and to make Findings of Fact and Conclusions of law on the objections.

MCA §85-2-309 specifies, in relevant part, "If the department determines that an objection to an application for a permit or change approval under 85-2-402 states a valid objection, it shall hold a public hearing . . . unless the department certifies an issue to the district court for determination by a water judge . . ." The Department made an administrative review of the objections and determined them to be valid, a determination which the Hearing Examiner iterates (above). Therefore, the Department was required to hold a public hearing, governed by the Montana Administrative Procedure Act (see MCA §85-2-121). MAPA in turn requires that an administrative agency must include proposed findings of fact and law in the proposal for decision issued pursuant to a contested case hearing. See MCA Title 2, Chapter 4, Part 6, specifically §§2-4-614 and 2-4-621(2).

As the statutes indicate, the Department not only has the jurisdiction to make Findings or Conclusions concerning the objections, but is statutorily obligated to do so, once the objections have been determined to be valid, and the matter has gone to public hearing. Therefore, the Motion to Dismiss cannot be granted on jurisdictional grounds.

3. Counsel for the Applicant appears to argue that the Water Court has specified the means of diversion for the Applicant's claimed water rights to be the Higbee Ditch, thereby preempting a Department decision in this matter. However, since all changes made to a water right after 1973 fall under Department, rather than Water Court jurisdiction (see Montana Water Use Act), the Water Court could only amend the point of diversion if the change had been made prior to 1983. The Applicants' own testimony indicates that this is not the case.

A review of Applicant's Exhibit 1, and evidence presented by Objectors' counsel, indicate that the Water Court did not assert it had jurisdiction to change the point of diversion for the Applicants' claimed rights from the Schoenberger Ditch to the Higbee Ditch.

The Master's Report of the Water Court (Applicant's Exhibit 1) on its face indicates that the Water Court has acknowledged jurisdiction over the change in point of diversion from the Schoenberger Ditch to the Higbee Ditch to lie with the Department: Finding of Fact 6 in the Report states "The parties agreed to withdraw their objections if a remark was added to this claim referencing the fact that the means of diversion would be changed from the Schoenberger Ditch to the Higbee Ditch", and Finding of Fact 7 states "The Montana Department of Natural Resources and Conservation, which is responsible for processing Applications for Change of Appropriation Water Right, has added a remark referencing such application." (Emphasis added.)

The "Abstract of Water Right" attached to the Report further indicates that the Water Court itself has not changed the point of diversion: The abstract is remarked "Application for Change received 6-12-85 for Change in Point of Diversion"; however, the point of diversion listed for the water right is the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West, which is the point of diversion for the Schoenberger Ditch, and not for the Higbee Ditch. (The Hearing Examiner notes that the location of the diversion point for the Schoenberger Ditch is more correctly identified as the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West. See August 6, 1985 Field Report. However, the legal given in the Madison County Water Resources Survey publication and in the Statements of Claim on Schoenberger Ditch lists the Schoenberger point of diversion in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35. See Statements of Claim Nos. WO23770-41F, WO23771-41F, and WO23773-41F.)

The determination that the Water Court intended for the change to be processed by the Department is reinforced by the July 3, 1985 minutes of the prehearing meeting referred to in the Master's Report (as referenced by counsel for the Objectors). The minutes indicate that the Water Court expected the Application for Change to proceed through an administrative process before the Department. Lewis Hughes testified that Water Master Kathryn Lambert had advised him to file the Application, prior to the prehearing meeting.

Therefore, the Motion to Dismiss cannot be granted based on a prior granting by the Water Court of the change in point of diversion.

The Applicant's Motion to Dismiss hereby is denied, based on the insufficiency of the grounds stated for dismissal.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. MCA Section 85-2-402 states, in relevant part, "An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, if applicable, of the legislature." The requirement of legislative approval does not apply in this matter. See MCA §85-2-402(4).

2. Application for Change of Appropriation Water Right No. 23770-41F was duly filed with the Department of Natural Resources and Conservation on June 12, 1985 at 11:26 a.m.

3. The pertinent portions of the Application were published in the Madisonian, a newspaper of general circulation in the area of the source, on July 18 and 25, 1985.

4. Applicant Hughes Ranch has applied to change the point of diversion for claimed Water Right Nos. WO23770-41F, WO23771-41F, and WO23773-41F from the Schoenberger Ditch, which diverts water from South Meadow Creek at a point in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West, to the Higbee Ditch, which diverts water from South Meadow Creek at a point in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West, all in Madison County, Montana.

The Higbee Ditch is located approximately 1500 feet downstream from the Schoenberger Ditch. (See August 6, 1985 Field Report Report by Scott Compton.) There are no intervening points of diversion between the two ditches.

Claimed Water Right Nos. WO23770-41F, WO23771-41F, and WO23773-41F, historically diverted by means of the Schoenberger Ditch, have a combined flow rate of 127.7 miner's inches (1432 gpm or 3.19 cfs). The Applicant proposes to divert these rights through the Higbee Ditch, in addition to its other water rights which historically have been diverted through the Higbee Ditch. Lewis Hughes and Larry Hughes testified that they are trying to consolidate their water into one diversion ditch for greater efficiency, and so that the property owners along the two ditches (which parallel each other, a couple hundred yards apart) will only have to deal with one ditch being in use.

5. The source of the water herein proposed to be diverted at a changed point of diversion is South Meadow Creek, a perennial stream.

6. Testimony indicates that the headgate on the Higbee Ditch is adequate to handle the proposed increase in flow.

The Higbee Ditch headgate consists of a concrete structure, with a two-foot diameter culvert and sliding gate which control the flow into the ditch. (See August 6, 1985 Field Report.) Scott Compton testified that the headgate should be able to handle the increased flow, although he did not take any measurements on his August 5, 1985 site visit because no flow was going through the headgate at the time of the visit. Larry Hughes testified that, based on his

experience, the ditch will carry at least 240 miner's inches ("m.i."). Lewis Hughes testified that he believes the ditch is capable of carrying more than 240 m.i.

The Temporary Decree issued in the adjudication process indicates that approximately 9.38 cfs (about 4210 gpm, or 376 m.i.) of flow has been claimed on Higbee Ditch. Of this amount, Hughes Ranch has claimed 7.5 cfs. (One other right, for 1.88 cfs, has been claimed by an entity which is not a party to the present matter.) However, actual use of the Ditch is much less, due to recent water shortages and the resultant turning off of water by the Water Commissioner. Larry Hughes testified that most of the rights diverted through Higbee Ditch are high water rights, and have resulted in very little water being run through the Ditch in recent years, perhaps a maximum of 125 m.i. However, a "lot of water" was run down the ditch in years when high flows were available, and the ditch has been capable of handling it.

7. Testimony indicates that the measuring device in place on the Higbee Ditch should be adequate to handle the proposed increase in flow.

The Applicants previously had installed two Parshall flumes in the Higbee Ditch. However, one of them was removed after being inundated and the other one, located more than 770 feet from the ditch headgate, was determined by the water commissioner to be located too far from the headgate for accurate measurement. Therefore, the Applicants installed a 3-foot wide rectangular weir approximately 50 feet downstream from the headgate. (Testimony of Larry Hughes.)

The Applicants installed a peg approximately 10 inches from the weir, level with the orifice, where a tape is put up to measure the water. Larry Hughes testified that the ditch rider has seen the measuring device, and has judged it to be adequate. Mr. Hughes testified from his personal knowledge that the measuring device is adequate to measure at least 240 m.i.

8. Evidence in the record in this matter indicates that the Applicants will be able to access the place of use from the proposed point of diversion.

One of the main concerns expressed by the Objectors in this matter was that the proposed point of diversion and means of diversion (the Higbee Ditch) was not adequate, because there did not appear to be a way to reach the claimed places of use from the Higbee Ditch.

At the present time, there are no ditches connecting the Higbee Ditch to the lower Schoenberger Ditch, so that the Applicants can consolidate their claimed rights as they testified is their intent, nor are there any ditches leading from the Higbee Ditch directly to the places of use. However, the Applicants intend to remedy this by running a pipeline from the Higbee Ditch to the lower Schoenberger Ditch. (Testimony of Larry Hughes; see location marked on Objectors' Exhibit A.) The lower Schoenberger Ditch historically (and at the present time) has carried water for irrigation and stockwater to the claimed places of use in Section 36, Township 4 South, Range 2 West; Section 6, Township 5 South, Range 1 West; and Section 1, Township 5 South, Range 2 West (see Statements of Claim Nos. WO23770-41F, WO23771-41F, and WO23773-41F).

9. The pipeline will be laid in the Higbee Ditch, and across the Applicant's own property. (See Objectors' Exhibit A.) The Applicants do not intend to dig a ditch or lay pipeline across the property of the Objectors or other landowners. (Testimony of Lewis Hughes and Larry Hughes.) This addresses the Objectors' concern that an additional ditch across their property would be needed.

The Applicants intend to lay the head of the pipeline far enough up the ditch that it will be higher than the end of the pipeline, so that the system can use gravity flow. The pipeline will have to go uphill for a short distance, but the Higbee Ditch has a very steep grade in the stretch where the Applicants propose to lay the head of the pipeline, so that sufficient water pressure will exist to deliver the water to the Applicants' land. (Testimony of Larry Hughes and Lewis Hughes.)

Larry Hughes testified that as small a flow as 70 m.i. will be sufficient to gravity feed the system. Lewis Hughes testified that they will use a pump to supplement the gravity feed, if necessary, or if it proves necessary to remove the pipeline from the ditch so that the Objectors have access through the ditch. (See Finding of Fact 10, below.)

10. Testimony indicates that the Applicants have made provision in their planned diversion for the Objectors to be able to gain access to water rights and property.

When the proposed pipeline is laid across the Applicants' property, it will have to cross a ditch which carries water to Objector Robertson. Larry Hughes testified that the water will be flumed across Robertson's ditch, or that the pipeline will be laid

on a bridge across the ditch; in any event, that the water from the proposed pipeline will be carried over the top of Robertson's ditch in a manner that does not interfere with the flow of water in the ditch. Objector Robertson stated through counsel that he did not object to the Applicants' plan, as long as construction of the pipeline and of the bridge or flume does not block his ditch, and his ditch is left as it exists prior to the construction.

Objector Megee testified that he is concerned about being able to gain access to that portion of his property which lies north of the Higbee Ditch. He stated that he presently accesses the property by driving through the ditch, occasionally crossing in the area indicated by the Hughes as the location of the pipeline. (See Objectors' Exhibit A.) However, Larry Hughes testified that at least half the length of the Higbee Ditch as it runs through the Megee property will be left open (no pipeline laid), and that he would make arrangements so that Mr. Megee could cross the pipeline if necessary. Lewis Hughes testified that they can leave the ditch open to the property line and then pump water into a pipeline laid only on the Hughes property if the pipeline "interferes with the Objectors", or that they will consider burying the pipeline.

11. Objector Gibbs expressed concern that the Applicants have been granted stockwater rights in the adjudication process which were not decreed to them in the South Meadow Creek decree.

12. A review of Department records does not disclose other planned uses or developments on South Meadow Creek for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relative substantive and procedural requirements of law or rule have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. As provided in MCA §85-2-402(2), the Department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

4. The proposed uses of water, irrigation and stockwatering, are beneficial uses of water. See MCA §85-2-102(2).

5. The proposed means of diversion, construction, and operation of the appropriation works are adequate. (See Findings of Fact 6, 7, 8, 9, and 10.) The Applicants provided substantial credible evidence that construction of the proposed pipeline from Higbee

Ditch to Schoenberger Ditch, the proposed diversion by means of the Higbee Ditch and the pipeline, and the proposed operation of the appropriation works are adequate to handle the flows which the Applicants will be receiving. (See Finding of Fact 6.)

Any change authorization issued in this matter will be conditioned to ensure adequate headgate, diversion, and measuring structures are installed in the event that the Applicants are able to divert more of their claimed rights than has been the case in the last few years.¹ (See Finding of Fact 6.) Additionally, Department records indicate that the Applicants own all but one of the water rights (for 1.88 cfs) which specify Higbee Ditch as the point of diversion. Therefore, the Applicants presumably will be able to regulate their water use to fit the carrying capacity of the means of diversion, in the event they are allowed to divert more water than previously has been delivered to them.

6. The Applicants have provided substantial credible evidence that the proposed change will not adversely affect the water rights of other persons.

Changing the point of diversion from the Schoenberger Ditch to the Higbee Ditch will not result in any effect to other diversions. There are no intervening points of diversion between the

¹ There is no evidence to suggest that the Applicants will be able to divert more water than their appropriation works can handle. (See Finding of Fact 6.) However, provision will be made for higher flows, in order to ensure that the means of diversion will remain adequate under higher than expected flow conditions.

Schoenberger Ditch and the Higbee Ditch (Finding of Fact 5), and there is no indication that the Applicants' proposed consolidation of water rights will affect the only other claimed right out of Higbee Ditch.

The only possible effect to another water right alleged was that the Applicants' proposed pipeline would cross a ditch used by Objector Robertson. However, the Applicants intend to construct the pipeline in a manner that will not interfere with flows in the ditch. (See Finding of Fact 9.) The other concerns which the Objectors voiced did not involve adverse effect to water rights, and therefore are outside DNRC jurisdiction. Nevertheless, Applicants showed that these concerns would be met. (See Finding of Fact 10.)

The record shows that the proposed use will not affect other planned uses or developments for which a permit has been issued or for which water has been reserved. (See Finding of Fact 12.)

7. The Applicants and the Objectors agreed that the easement for the Higbee Ditch may have to be expanded to some degree. However, the issue of whether an additional (enlarged) easement may be obtained through legal proceedings is outside the scope of the Department's jurisdiction. If the easement cannot be obtained, and as a result the proposed change cannot be accomplished, the Change Authorization will not be perfected. See generally In the Matter of Application for Beneficial Water Use Permit No. 55390-s76H by Heather J. Grayson, January 24, 1986 Proposal for Decision (Final Order March 7, 1986.)

The Department also cannot address the issue raised by Objector Gibbs, of whether the Applicants have been granted stockwater rights in the adjudication process to which they are not entitled. This is

an adjudication matter which must be raised before the Water Court, and it is therefore outside the scope of the Department's jurisdiction.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Change of Appropriation Water Right No. 23770-41F is hereby granted to Hughes Ranch to change the diversion point for claimed Water Rights Nos. WO23770-41F, WO23771-41F, and WO23773-41F to the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West, from the past point of diversion in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 35, Township 4 South, Range 2 West (Schoenberger Ditch, incorrectly described in the Statements of Claim as diverting at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35), Madison County, Montana. Authorization is also granted to change the means of diversion from the Schoenberger Ditch to the Higbee Ditch. Water will be carried from the Higbee Ditch to the lower Schoenberger Ditch, by means of a pipeline, for distribution to the claimed places of use. The source of water for the diversion is South Meadow Creek.

The Change Authorization in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Change Authorization is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Appropriator to the detriment of any senior appropriator.

B. Issuance of this Change Authorization by the Department shall not reduce the Appropriator's liability for damages caused by exercise of this Authorization, nor does the Department, in issuing this Authorization, acknowledge any liability for damages caused by exercise of the Change Authorization, even if such damage is a necessary and unavoidable consequence of the same.

C. The Appropriator shall ensure that the headgate and ditch which constitute the means of diversion are constructed and maintained in a manner adequate to carry the entire flow of water to which the Appropriator is entitled. In the event that the flow which the Appropriator is able to obtain exceeds the capacity of the Higbee Ditch, the headgate and ditch must be modified to adequately divert and carry the maximum flow.

D. Issuance of this Change Authorization by the Department in no way grants the Appropriator any easement rights, or the right to enter upon the property of other persons or upon federal lands to exercise this Change Authorization, or to enlarge any existing easements.

E. The Appropriator must maintain a measuring device capable of accurately measuring all flows to be diverted through the Higbee Ditch. In the event that the Appropriator is able to obtain flows which cannot be handled by the present measuring device, the

measuring device must be modified or replaced by a measuring device capable of accurately measuring the maximum flow. Such measuring device must be approved by the appropriate water commissioner prior to any diversion made pursuant to this Change Authorization.

F. The change in water use granted by this authorization is subject to the authority of court appointed water commissioners to admeasure and distribute water in the source of supply.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party.

MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 17th day of May, 1988.

Peggy A. Elting
Peggy A. Elting, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
Helena, Montana 59620-2301
(406) 444 - 6612

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by first class mail upon all parties of record at their address or addresses this 17th day of May, 1988, as follows:

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Sally Martinez
Secretary

CASE # 23770